In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-736

WASHINGTON RESEARCH PROJECT, INC., PETITIONER

v.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Plaintiff contends that the court of appeals erred in holding exempt from compulsory public disclosure, under the Freedom of Information Act, evaluations of proposed research projects prepared by an initial review group for the use of the National Advisory Mental Health Council in advising the National Institute of Mental Health about proposed grants for such projects.

Plaintiff sued to compel disclosure of applications for proposed research grants and of certain documents prepared in the course of NIMH's evaluation of such applications. The district court granted relief as to all

documents (Pet. App. B1-B16; 366 F. Supp. 929) and the court of appeals affirmed as to the applications[1] but reversed as to the evaluative reports (Pet. App. A18-A24; 504 F.2d 238).

The Public Health Service Act authorizes the Secretary of Health, Education and Welfare to make grants for the development of improved methods of diagnosing and treating mental illness,[2] upon the recommendation of the National Advisory Mental Health Council ("NAMHC"), an advisory body composed of medical and scientific authorities in fields related to mental health; outstanding citizens with special interest in mental health matters; and government officials on an *ex officio* basis. 42 U.S.C. 218(a), 242a(a)(2) and 242a(h). As the Secretary's delegate, a unit of the Public Health Service, the National Institute of Mental Health ("NIMH") (see 38 Fed. Reg. 27316; 39 Fed. Reg. 1654, 1657-1658), has established a system for the initial review of grant applications by *ad hoc* or standing review groups ("IRGs") composed

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[1]We believe that both courts erred in holding that the applications were not covered by the exemption for "trade secrets and commercial or financial information" (5 U.S.C. 552(b)(4)), but have not sought review because the court of appeals' ruling was limited to applications resulting in grants and the record in this case insufficiently established the need for confidentiality of such applications (Pet. App. A8-A10).

[2]The Act originally authorized the Surgeon General to make such grants, but this authority was vested in the Secretary by Reorganization Plan No. 3 of 1966, 80 Stat. 1610.

of consultants expert in various specialties of mental health research (Pet. App. A12), assisted by an NIMH employee who serves as Executive Secretary.[3]

The IRGs meet periodically to consider applications, including the scientific merit of the project, the researchers' qualifications, the proposed budget and the period of support requested. After discussing each application, the IRG members vote on their recommendation to NAMHC —*i.e.*, approval, disapproval, or deferral of the application—and they assign priority ratings based on scientific merit in cases of recommended approval. IRG actions are not disclosed to the applicants or to the general public (*id.* at A15).

Following an IRG meeting, the Executive Secretary prepares a summary ("pink sheet") for each application reviewed, including a summary of the considerations that led to the recommendation, an opinion as to the professional qualifications and competence of the researchers, discussion of the proposed budget and resources to be used, a summary of any report on a visit to the applicants' facilities, and the minority views of IRG members. The Executive Secretary may add a "Note" to clarify any matter not resolved by the IRG, to incorporate information obtained subsequent to the IRG meeting, or to direct attention to relevant factors other than scientific merit (*id.* at A5).

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[3]Each grant application is referred to the Executive Secretary of the pertinent IRG. The Executive Secretary refers the application to IRG members who prepare an evaluation of each application and, if necessary, a "site visit" report concerning any visit to the applicant's research facilities (*id.* at A4). The court of appeals held that such site visit reports are not subject to compulsory disclosure, a ruling not challenged in the petition.

NAMHC reviews the applications and pink sheets and determines its own recommendation to NIMH, based upon such factors as program priority and general policy. After consideration of NAMHC's recommendation and such additional factors and availibility of funds, NIMH then determines whether to award a grant (*id.* at A6).

2. Petitioner's contention that the summary of the IRG meeting is the "opinion" of NIMH itself concerning the grants it makes (Pet. 8-12), was properly rejected in the comprehensive opinion of the court of appeals, on which we rely (Pet. App. A15-A17).

In holding that the IRG's were part of NIMH, not separate agencies, and that the courts should not inquire into the extent of NIMH's review to see if the IRG reports constituted the actual decision of the agency, the court of appeals stated (*id.* at A15-A17):

> * * * IRGs do confine themselves to making recommendations, authority to make grants is vested in the Secretary, and authority to recommend doing so lies with the NAMHC. The IRGs act as consultants to the NAMHC; their members are strictly forbidden from communicating their group's recommendations to applicants. NIMH Handbook, *supra* note 2, at 30. Applicable regulations and administrative rules within NIMH and HEW have consistently reflected the view that the IRGs are not subject to the FOIA, *see id.;* 45 C.F.R. §§ 5.72(b), 5.73(a); and the authority under which they are appointed gives no hint of a congressional expectation that NAMHC's delegation of the initial review function would somehow make either more or less information available to the legislature or the public.

* * * Employing consultants to improve the quality of the work that is done cannot elevate the consultants to the status of the agency for which they work unless they become the functional equivalent of the agency, making its decisions for it. There is no doubt in this instance that the usually perfunctory review the NAMHC gives to a particular application— as opposed to the group of which it is a part—makes the IRGs' recommendations an often crucial element in the approval process. But, just as the APA makes the fact that a government authority's decisions are subject to review irrelevant in determining whether that authority is an agency, at least in this case the degree of scrutiny its decisions are given on review is equally beside the point.

The important consideration is whether it has any authority in law to make decisions. The IRGs have not; their favor is not necessary because the law empowers the Secretary to make grant awards if (and only if) the NAMHC so recommends. The fact that the NAMHC may be greatly influenced by the IRG's expert view does not make the IRG an agency. See *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1359 (2d Cir. 1971). * * * [I]n *Grumman II* we looked to the functions that * * * the Regional Boards * * * were empowered by law to perform. The alternative would inevitably involve the courts in determining the care with which the decisional officers of government agencies supervise their staffs, in order to determine whether in fact the staff is not the stand-in for the officer or agency—its recommendations his decisions—and whether it ought not therefore in law to be held accountable as the agency. This we cannot do. *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

That is not to say that a staff recommendation may never achieve the dignity of an agency's final decision; it may do so when the agency adopts it as its own, and at that point its disclosure can be required. * * * In the present case, however, leaving aside the problem of whether even the denial of a grant award is "affirmative action" against an applicant, the reasoning of the IRG is not the "only basis" for the Secretary's decision. The Executive Secretary's Note and the NAMHC's policy choices, and in some instances the latter's particularized scrutiny, intervene. * * *[4]

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[4]The court of appeals distinguished its prior decisons in *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C.), and *Grumman Engineering Corp.* v. *Renegotiation Board*, 482 F.2d 710 (C.A.D.C.), No. 73-1316, argued January 14, 1975, on the ground that, unlike the agencies there involved (the Office of Science and Technology and the Regional Boards of the Renegotiation Board), "the IRGs do confine themselves to making recommendations" (Pet. App. A15). On writ of certiorari in *Grumman* the Renegotiation Board has argued that the court of appeals incorrectly decided that case because, *inter alia*, "the Board simply approves or disapproves the * * * [Regional Board's recommendation]. It does not adopt any of the memoranda that are before it" (Appendix, No. 73-1316, p. 79). Petitioner here, adopting the government's view of the evidence in *Grumman*, states that "it is arguable that the full Renegotiation Board exercises true independent review over the divisional and regional recommendations * * *" (Pet. 11). Petitioner therefore concludes that this case, and only this case, presents the "basic principle * * * whether [only] agencies which *in fact* adopt staff recommendations as their own must disclose those recommendations to the public" (Pet. 11-12). However, that issue is, if anything, less squarely presented here than in *Grumman* because here even the lower court found that the NIMH does not "in fact adopt" IRG recommendations as its "own" in any relevant sense.

3. Petitioner's alternative contention (Pet. 12) that the court of appeals' decision "misinterprets" this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, in holding that the pink sheets are exempt from disclosure as "inter-agency or intra-agency memorandums" (5 U.S.C. 552(b)(5)), rests upon the unfounded premise that the contents of the pink sheets are "factual" in any meaningful sense. After examining and describing representative samples, the court of appeals concluded, however, in an opinion on which we rely (Pet. App. A20-A22):

> [I]t is clear that most of the matters called for in the site visit report and Summary Statement for each application are evaluative, and call into play the policy of protecting the deliberative process, at which Exemption 5 is directed. *See EPA* v. *Mink, supra* * * *. Indeed, the only matters that are even arguably subject to compelled disclosure are the Summary Statements' (2) description of the proposal, its aims and methodology, and any factual matter contained in (9) the summary of the site visit report. In the site visit report itself, only (11) the statement of facilities, and (12) the budget, merit comment.
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> Of these four items, the two (2 and 9) in the Summary Statement are abstracts of other information—either the site visit or portions of the underlying application. As such we think them covered by the reasoning of [*Montrose Chemical Co.* v. *Train*, 491 F.2d 63 (C.A. D.C.)] * * *. That case involved application of Exemption 5 to summaries, made by agency staff attorneys, of evidence developed at a public hearing. The summaries were prepared for and submitted to the Administrator of the Environmental

Protection Agency "to assist [him] in his study of the record" on the basis of which he was obliged to make a decision. This court held the summaries exempt as an integral part of the deliberative process. Sensitive to the necessity of attaching varying degrees of significance to different facts in the course of epitomizing the record, we said:

> Even if they cited portions of the evidence verbatim, the assistants were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the important is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection. 491 F. 2d at 68.

No significant difference distinguishes the present case from *Montrose Chemical.* The research design and description of methodology in the application submitted for *in camera* inspection covers fifteen, single-spaced typewritten pages; their description in the Summary Statement is one page in length. In the *Montrose Chemical* paradigm, the judgmental element arises through the necessity to select and emphasize certain facts at the expense of others. In the instant case, where the whole proposal must be described at least in general, various aspects of it are described in greater detail than others. In virtually every sentence

> the author must operate at a level of specificity that reflects his personal perspective on the material being summarized. [Footnotes omitted.][5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[5]Petitioner contends (Pet. 13-15) that, regardless of whether the contents of a document are factual or deliberative, once considered by a agency in making a decision they become "facts" beyond the protection of Exemption 5. This contention is untenable, for it would render meaningless the distinction between "fact" and opinion and would undermine the deliberative process that Exemption 5 was designed to protect. See *Environmental Protection Agency* v. *Mink, supra.*